

ket DBS services with smaller antennas and lower installation costs than PRIMESTAR's current offerings. DirecTV and USSB are DBS providers competing today for subscribers. DirecTV controls 27 high power channel assignments over which it will purportedly be able to transmit as many as 216 video/audio channels, and USSB is providing 20 channels of video service. (In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48, **First Report** (Sept. 28, 1994) ("1994 Cable Report") at ¶¶ 63, 64.) EchoStar is poised to enter the DBS field in 1995 with 21 transponders, and a number of other ventures have been authorized to provide DBS service (1994 Cable Report at ¶67).

11. It is clear, however, that the product market in which PRIMESTAR competes now and will be competing in mid-1996 is broader than DBS services. A monopolist of DBS services would not be able to price above competitive levels because most consumers have other ways to receive multiple channels of video programming. Among the options available to most consumers is cable television. Over 96 percent of U.S. television households could receive cable service by the end of 1993 (1994 Cable Report at ¶18). Distribution of video by wire has traditionally been provided almost exclusively by cable television operators. This is expected to change in the near future. In particular local telephone companies have been authorized to provide VDT services which provide the facilities for additional direct competition with cable television operators. Twenty-four applications from telephone companies, including six of the seven RBOCs as well as GTE, have been filed with the Commission for permanent commercial VDT service to over 8.5 million homes (1994 Cable Report at ¶109). A number of telephone companies have plans to implement VDT as well as video programming services, and at least some of these are likely to be operational by 1996. For example, Ameritech has recently hired 2,200 workers to plan and implement its entry into VDT cable television. (See **Detroit Free Press**, Oct. 12, 1994 at 9C.) Nynex, Bell Atlantic and Pacific Telesis have unveiled a \$300 million plan to com-

pete with cable TV with programming distributed by telephone starting in the 2nd half of 1995. (See **Communications Daily**, Nov. 1, 1994.)

12. Other multiple channel programming choices available to consumers include MMDS or "wireless cable." By June 1994 there were 143 such systems serving over a half million subscribers (1994 Cable Report at ¶79). It has been estimated that nearly 40 percent of U.S. television households are capable of receiving wireless cable (1994 Cable Report at ¶90 and n. 254). There are also approximately three to four thousand SMATV systems nationwide serving over 1 million subscribers (1994 Cable Report at ¶92). Some consumers have, or could obtain, home satellite dishes receiving service from TVRO distributors utilizing C band satellite technology. While the majority of the approximately 4 million home satellite dishes in use were purchased by owners without access to cable television, 37 percent of the owners did have access to cable television and still chose to buy this method of program delivery (1994 Cable Report at ¶¶ 73, 74). In the future LMDS services using high-frequency microwave channels in the 28 GHz band could also be available to consumers. Currently an LMDS service is operating in Brooklyn, New York providing forty-nine video channels, and over 900 applications have been submitted to the FCC for similar services (1994 Cable Report at ¶122 and n. 349).
13. I have concluded that PRIMESTAR's DBS services utilizing the channel assignments at issue in this proceeding will compete in a broad video market that includes at least cable television, VDT systems, MMDS providers, SMATV systems, TVRO providers, and, possibly in the future, LMDS systems. My conclusions are consistent with the Commission's own findings (1994 Cable Report at ¶49). This market definition is conservative because it does not take into account the important competitive constraints offered by broadcast television and VCRs.

#### IV. Horizontal Issues

##### A. Control of DBS Channels

14. One of the arguments raised by petitioners is that the application will result in TEMPO/TCI controlling an excessive number of high power DBS channels (Petition to Deny of DirecTV, Inc. at 3, Petition to Deny of EchoStar Satellite Corp. at 26, 27, and Petition to Deny of Directsat Corp. at 2). A modest increase in concentration of control of DBS channels, however, has no competitive significance because the relevant market is much broader than DBS services. I have concluded, as has the Commission, that DBS service is not a market. That means that even a complete consolidation of DBS channels into the hands of a single operator would not convey market power unless that "monopolist" would not face effective competition from other delivery modes.
15. Assuming *arguendo* that the market consisted merely of DBS services, there would be no increase in concentration of control of DBS channels from the grant of this application. PRIMESTAR will be moving its satellite-to-home services from one orbital location to another. TEMPO Satellite, Inc., will retain its DBS authorization at 119°W. TCI will not control the use of PRIMESTAR's DBS channels because TCI has only a minority interest in PRIMESTAR. Thus, concentration in the control of channels would not be increased by this transaction in a DBS market.
16. To explain the preceding point in somewhat greater detail, consider that PRIMESTAR has first option on TEMPO Satellite Inc.'s current assigned 11 high power DBS channels at 119°W. If the application is approved, and PRIMESTAR is able to utilize the channels at 110°W, PRIMESTAR will give up that option and instead lease the 27 channels that TEMPO will acquire from Advanced at 110°W. (See Declaration of John J. Cusick at ¶3.) The net result is that PRIMESTAR will provide service on the 27 channels now assigned to Advanced, and TEMPO Satellite will independently operate the 11 channels that it previously optioned to PRIMESTAR. As a result, the 27 and 11 channels will be

E C O N O M I S T S   I N C O R P O R A T E D

utilized by separate entities, as would be the case today. At worst it might be argued that TCI, not TEMPO, would be acquiring greater control of DBS channels if the application is approved. Added to TCI's original 11 channels through its ownership of TEMPO Satellite Inc. would be its approximately 22 percent share, reflecting its ownership interest in PRIMESTAR, of the 27 channels which would be leased to PRIMESTAR, or 6 more channels. But if one were to attribute channels to TCI based on its partial ownership of PRIMESTAR, one should also apportion the remaining 21 channels to PRIMESTAR's other six owners. If one were to do so, the application would in effect be deconcentrating the control of DBS channels because Advanced's 27 channels would be split from single control into seven separate pieces.

17. If one examines the broader market for multi-channel video programming, granting the application is clearly pro-competitive. PRIMESTAR's competitive effectiveness will be enhanced with more channels and Advanced's DBS channel assignment will be employed more quickly which will promote competition in the video marketplace.

*B. PRIMESTAR's Future Incentives to Promote DBS Service*

18. Another claim by opponents of the application is that allowing cable-owned DBS operators to acquire more channels will result in less vigorous promotion of DBS services in certain cable franchise areas. (Petition to Deny of EchoStar Satellite Corp. at 27-29). This claim fails to analyze properly PRIMESTAR's incentives in the video market as that market will evolve in the near future. Moreover, if such a claim were true, petitioners making this claim would benefit from grant of the very application they are opposing. This is strong evidence that the arguments they are making are spurious and that their true motive is to oppose an application that is pro-competitive.
19. Petitioners propose that PRIMESTAR will not be positioned to provide services to cable subscribers, will not be marketed aggressively, and will be a mere "adjunct" to cable. Even if PRIMESTAR did have the inclination to avoid competition in its owners' territories, effective com-

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petition from *others* now and in the near future makes following that inclination untenable. PRIMESTAR will be making an investment in its DBS system of approximately \$1 billion, and it faces current competition from at least two other DBS providers, DirecTV and USSB, and likely future competition from EchoStar and from telco VDT. In these circumstances, PRIMESTAR risks failure of its DBS venture and the loss of its sunk costs unless it engages in aggressive nationwide marketing of its DBS offering. PRIMESTAR simply cannot afford to ignore more than 50 percent of the potential DBS market, *i.e.*, the percentage of U.S. television households located in PRIMESTAR's cable partners' respective franchise areas. To do so would not prevent erosion of cable's market share to DBS, but would merely cede that share to PRIMESTAR's DBS competitors. That strategy cannot be profitable to PRIMESTAR's owners. As a result, PRIMESTAR clearly will have the incentive to vigorously promote its services everywhere, without regard to its partners' investment in individual cable systems.

### *C. The Significance of Competitor Complaints*

20. Another claim by opponents of the application is that allowing cable-owned DBS operators to acquire more channels diminishes competition in the MVPD market because such operators do not have incentives to compete with their cable affiliates (Petition to Deny of DirecTV, Inc. at 20, Petition to Deny of EchoStar Satellite Corp. at 27, and Petition to Deny of Directsat Corp. at 2). Strong evidence that this claim is invalid is provided by the opposition to the application of PRIMESTAR's DBS competitors. If petitioners' argument were correct that PRIMESTAR will not aggressively promote its services and compete in its cable partners' respective territories, these DBS competitors could only gain. PRIMESTAR would not be a competitive factor in over 50 percent of their market. In effect what petitioners are claiming is that the application would remove 27 high power channels from effective competition to *them*. If they were correct, they would be major beneficiaries of the very action they are opposing! Simple self-interest is inconsistent with the argument they are making.

21. Clearly, it is aggressive competition from PRIMESTAR that its DBS competitors fear, not that PRIMESTAR will pull its punches in its partners' cable territories. Granting the application would allow PRIMESTAR to compete on an equal footing with DirecTV, which itself controls 27 channels and through compression can offer consumers well over 200 channels. PRIMESTAR is simply seeking the same capacity as its closest competitor, who clearly opposes the application for its own anti-competitive gain. Other DBS competitors can achieve similar capacity because, as DirecTV observes, the Commission has recognized that DBS participants may want to combine their resources and assignments (DirecTV Petition to Deny at 16). The Petitioners are simply seeking to prevent a pro-competitive transfer of Advanced's assignment that will result in more effective competition from PRIMESTAR.

*D. Anti-competitive Pricing*

22. EchoStar in its petition raises the specter that TCI and/or PRIMESTAR will engage in anti-competitive pricing that "could suffocate DBS competition" without providing any legitimate economic analysis that demonstrates that such strategies are feasible or profitable (EchoStar Petition to Deny at 30). EchoStar merely asserts that PRIMESTAR could somehow obtain a cost advantage to undercut its DBS competitors' prices and drive them out of business.
23. EchoStar has failed to articulate a legitimate anti-competitive theory. In the first place, pricing to take advantage of lower costs is the very essence of competitive pricing. If PRIMESTAR were somehow to have lower costs and offered lower prices because of those lower costs, competition would be enhanced, not harmed. Moreover, contrary to petitioners' other claims, such lower prices for PRIMESTAR services would likely maximize the competitive significance of DBS *vis a vis* existing cable operators.
24. Second, EchoStar provides no basis to believe that PRIMESTAR would be able to achieve lower costs in order to effectuate the alleged "anti-competitive" pricing. EchoStar simply asserts that TCI's control over a

large number of DBS assignments could translate into the largest subscriber base resulting in lower average costs. But if the application is approved, PRIMESTAR will lease only the same number of DBS assignments as DirecTV. Other would-be DBS competitors could reach similar numbers of channels by combining assignments. Moreover, if EchoStar's theory were correct, DirecTV poses an anti-competitive threat today because it controls the largest DBS assignment. Granting the application, because it allows another competitor to have the same number of channel assignments as the current market leader, actually removes the "threat" that controlling the greatest number of frequencies results in the ability to engage in anti-competitive pricing.

25. Finally, it is virtually impossible that TCI or PRIMESTAR could profitably engage in anti-competitive or predatory pricing in the video market. Predatory pricing involves pricing below cost (and hence incurring immediate losses) in an effort to eliminate competitors, and with the goal of raising prices (and thus earning future profits) once the competitors have exited. Predatory pricing rarely makes sense in unregulated markets because the lost profits during the exclusionary pricing period cannot be recouped later. Exclusionary pricing cannot be profitable if large losses are necessary to drive competitors out of the market and/or if those losses cannot be recovered through above-competitive prices later because other competitors can enter or expand.
26. These factors inhibiting predatory pricing are present in the video market. Even focusing narrowly on the DBS segment, it would be difficult to force existing DBS competitors out of the market with low prices given that they have already incurred the significant sunk costs of entry. Existing DBS competitors would find it profitable to remain in the market if they could still cover their low variable costs. Thus, it likely would require a long period of very low prices to drive most existing DBS competitors out of the market, which would mean very large losses for PRIMESTAR to engage in such a strategy. But these losses could not be recovered later because of the presence in the market of other competitors, especially DirecTV and telephone companies

providing VDT and other video services. PRIMESTAR simply will not be able to predate against or exclude all other competitors' video services through a strategy of temporary low prices, because telephone companies as well as DirecTV's parent, General Motors, have deeper pockets than PRIMESTAR or its owners. But this means it is not profitable for PRIMESTAR to predate against a subset of other competitors because above-competitive prices and profits cannot be sustained after these other competitors have been eliminated.

### **V. Vertical Market Foreclosure**

27. EchoStar has also alleged that TCI and/or PRIMESTAR could harm DBS competitors by denying or providing only on discriminatory terms programming from PRIMESTAR-affiliated programming vendors (EchoStar Petition to Deny at 33-35). The evidence clearly shows that TCI and PRIMESTAR lack the incentive and the ability to engage in anti-competitive vertical foreclosure.
28. EchoStar fails to recognize that granting the application would not materially affect the ability of PRIMESTAR's cable partners to foreclose competing DBS providers. Under EchoStar's theory, PRIMESTAR's partners should be engaged in anti-competitive foreclosure today as a means of protecting their cable franchises from competition from DirecTV and USSB. Yet DirecTV and USSB have succeeded in licensing popular programming from PRIMESTAR's owners. This is strong evidence that PRIMESTAR's owners lack the incentive and/or the ability to deny programming for anti-competitive gain.
29. Similarly, EchoStar asserts that PRIMESTAR's partners could find it profitable to charge all DBS providers "artificially" high prices for PRIMESTAR-affiliated programming for anti-competitive purposes (EchoStar Petition to Deny at 35). But again, EchoStar fails to recognize that the incentive and ability to do this, such as they are, are also unaffected by granting the application. If PRIMESTAR-affiliated programmers could charge artificially high prices, they would do so whether or not the application is granted. But the reason PRIMESTAR-affiliated programmers cannot gouge any video distributor today is



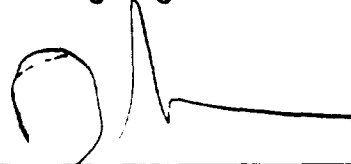
because PRIMESTAR-affiliated programmers face the same competitive constraints from the highly competitive program supply industry as all other participants in that market, and that will remain true if the application were granted.

30. TCI and its PRIMESTAR cable partners simply do not control a sufficient share of available programming to prevent DBS competitors access to attractive programming. The PRIMESTAR cable partners have ownership interests in only 28 of the 107 national programming services listed in the 1994 Cable Report (1994 Cable Report at Appendix G, Tables 3, 4 and 6). In addition no cable operator has any ownership interest in 68 of the 98 announced new programming services (1994 Cable Report at Appendix G, Table 5).

#### V. Conclusion

31. The application to assign Advanced's DBS authorizations to TEMPO is pro-competitive because it will permit PRIMESTAR to compete more effectively as a DBS provider. With the increased channel capacity PRIMESTAR will have the capability to offer consumers comparable numbers of programs as other competitors in the marketplace such as DirecTV. Arguments raised by PRIMESTAR's competitors that the transfer is anti-competitive do not survive analysis and should be rejected.

I declare under penalty of perjury that the foregoing is true and correct.



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Bruce M. Owen

November 22, 1994

**ECONOMISTS INCORPORATED**

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:  
Application for Consent to  
Assignment of DBS Construction  
Permit from Advanced  
Communications Corporation to  
TEMPO DBS, Inc.

}

DBS-84-01/94-15 ACP

**Supplemental Declaration of Bruce M. Owen**

1. I am an economist and president of Economists Incorporated, an economic consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036. I previously filed a declaration in this proceeding addressing both the economic issues raised by TEMPO DBS, Inc.'s ("TEMPO's") application to acquire Advanced Communications Corporation's ("Advanced's") direct broadcast satellite ("DBS") authorizations and allegations made in various Petitions to Deny by existing and potential DBS competitors that the assignment would result in competitive harm. I have been asked to respond to the Consolidated Replies of DirecTV, Inc. ("DirecTV") and Echostar Satellite Corporation ("Echostar") and their economic consultants, Professor Jerry A. Hausman and Professor Roger G. Noll, respectively.
2. It is noteworthy that neither the Replies by DirecTV and Echostar opposing TEMPO's application nor their economic experts address the point made in my earlier declaration (Owen Declaration at ¶¶ 20, 21) that the alleged anticompetitive effects, if true, would benefit Echostar and DirecTV. That is, if granting the application were to result in less competition among DBS and/or multichannel video program distribution ("MVPD") providers, that would imply that DirecTV and

Echostar, facing a less competitive marketplace, would gain higher profits and a larger market share. In that case, however, we would not expect to see them opposing an action that their own arguments indicate would lead to their own gain. A more likely explanation for their opposition is that TEMPO's application is pro-competitive, because in that case the economic interest of DirecTV and Echostar would be to oppose the application. Thus, the consultants' opinions on the diminution in competition caused by the application (Hausman at ¶16, Noll at ¶¶ 17-32) are belied by the identity of their sponsors. Moreover, Professor Hausman's view that the PRIMESTAR partners have much to lose if DBS succeeds (Hausman at ¶ 29) fails to explain why these partners are willing to invest \$1 billion in DBS.

3. Echostar's assertion (Echostar's Consolidated Reply at 5) that its DBS channel assignment falls short of the number necessary for the provision of a viable DBS service explains why PRIMESTAR needs the Advanced assignment in order to compete effectively. Indeed, Echostar's expert acknowledges the real purpose behind the application, i.e., to give PRIMESTAR access to high-power DBS and a greater capacity than is available on its FSS system (Noll at ¶ 25). This will tend to increase competition, as I previously explained (Owen Declaration at ¶¶ 17, 21). Moreover, Echostar's expert's conclusion that USSB and DirecTV are not entirely independent competitors (Noll at ¶ 24) indicates that this combined "firm" controls more channels than PRIMESTAR would if the application were granted.
4. Professor Hausman's observations at ¶ 24 that DirecTV and USSB have signed exclusives on programming do not support his or others' conclusions regarding anticompetitive vertical market foreclosure and have nothing to do with PRIMESTAR's attempts to compete as a DBS provider. The fact that DirecTV and USSB have obtained such programming from PRIMESTAR's partners indicates these vertically-integrated cable operators do not have the ability and/or the incentive to foreclose competitors. Moreover, to grant the application would not increase the ability of TCI or other vertically-integrated operators to deny programming to DBS competitors.

5. David Waterman's (and other related) research referred to by Echostar's expert (Noll at ¶ 35), even accepting its findings, fails to show any general pattern of discrimination against programming controlled by competitors and in which the cable operator has no interest, especially with respect to basic cable networks. It does show that cable operators with an interest in a program service are more likely to carry it than are operators without such an interest. But there is nothing anticompetitive about that. It merely shows that cable systems invest in programming to ensure that programming is available to enhance the demand for cable services.
6. Echostar's predictions of predatory tactics (Echostar's Consolidated Reply at 24, 25) do not make any economic sense, and it is noteworthy that they are not supported by its own expert. These allegations were treated at length and found to carry no weight in my earlier declaration at ¶¶ 22-26.
7. Professor Hausman is wrong at ¶ 12 in asserting that I claimed that cable operators will not have market power in 1996. Nowhere did I say anything about the lack of market power of cable operators. Instead, I was opining on the relevant market for DBS in 1996. Nor did I ever say that no competitive problem would arise if TCI acquired all available DBS frequencies (Hausman at ¶ 13). Rather I was applying standard market definition methodology to conclude that a hypothetical monopolist of DBS frequencies would not have market power because of adequate substitutes and competition from other MVPD providers.
8. Professor Hausman misstates the implications of my testimony in the 1985-86 Pacific Telesis ("PacTel") cellular case (Hausman at ¶ 20). ~~There~~ I predicted that PacTel's control of cellular would lead PacTel to position cellular technology as a mere complement to wireline telephony rather than developing it as a substitute, a prediction that Professor Hausman now concedes was accurate. More importantly, PacTel was in a position to control cellular's development because cellular service was the only existing technology that offered any hope of disciplining residential wireline telephone rates, and because FCC licensing limited the number of cellular competitors in each area to two.

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Cable operators face many more actual and potential competitors, including multiple DBS competitors, and do not have the ability or luxury to control DBS' development.

9. Echostar's expert's conclusion that cable and satellite services are not now and are unlikely in the next few years to be in the same relevant market for purposes of competitive analysis (Noll at ¶ 19) is contradicted by Professor Hausman at ¶¶ 10, 11 and by the Commission in its 1994 Cable Report at ¶ 49.
10. None of the arguments presented in DirecTV's and Echostar's Consolidated Replies affects my conclusion that the application to assign Advanced's DBS authorizations to TEMPO is pro-competitive. New and rehashed arguments raised by PRIMESTAR's competitors and their consultants that the transfer is anticompetitive are not analytically sound and should be rejected.

I declare under penalty of perjury that the foregoing is true and correct.



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Bruce M. Owen

January 3, 1995

**ECONOMISTS INCORPORATED**

# CURRICULUM VITÆ

Bruce M. Owen

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BACKGROUND	Born 1943, Worcester, Massachusetts • Attended public schools in Millbury, Massachusetts. • Married 1965 to the former Josetta Knopf • Two children: Peter 1969 and Bradford 1974.
EDUCATION	B.A. Williams College, 1965. Ph.D. Stanford University, 1970.
PRESENT POSITION	President, Economists Incorporated 1981- • Visiting Professor of Economics, Stanford University (Stanford in Washington) 1989-.
PREVIOUS EXPERIENCE	Antitrust Division, United States Department of Justice: Chief Economist, 1979-1981 • Duke University: Associate Professor of Business and Law 1978-1980, Adjunct Professor of Public Policy 1981-88 • Stanford University: Assistant Professor of Economics, 1973-1978 • White House Office of Telecommunications Policy: Chief Economist, 1971-1972.
CURRENT MEMBERSHIPS AND AFFILIATIONS	Member, American Economic Association • Member, Econometric Society • Member, Advisory Panel, ABA Antitrust Section Economics Committee • Member, American Law and Economics Association • Principal, Council for Excellence in Government • Member, National Economists Club.
FELLOWSHIPS	Merit Scholar 1961-65 • Woodrow Wilson Fellow 1966 • National Defense Education Act Title IV Fellow 1966-69 • Brookings Economic Policy Fellow 1970-1971 • Hoover Institution, National Fellow 1974-1975 • Fellow, Aspen Institute for Humanistic Studies, and Chairman, Aspen Institute Task Force on the Future of the Postal Service 1978-79.

RECENT PROFESSIONAL  
ACTIVITIES

Panelist, Symposium on Democracy, Diversity, and News Media Ownership, Stanford University, January 1990 • Panelist, Conference on the Reagan Revolution, University of Virginia Law School, April 1990 • Panelist, ABA Section of Antitrust Law Cable Television Symposium, June 1990 • Board of Editors, *Journal of Media Economics*, 1990- • Referee, *Scandinavian Journal of Economics*, 1990 • Chairman, Panel on Technological Change in Practice, 18<sup>th</sup> Annual Telecommunications Policy Research Conference, October 1990 • Discussant, Conference on Policy Approaches to the Deregulation of Network Industries, American Enterprise Institute, October 1990 • U.S. Advisory Team on Competition Law, Government of Jamaica, 1990-91 • Demonstration Expert Witness, DOJ Merger Training Program, December 1990 • Member, Economics and Finance Delegation to the Soviet Union, Citizen Ambassador Program, June 1991 • Organizer, Panel on the Future of the Broadcast Networks, 19<sup>th</sup> Annual Telecommunications Policy Research Conference, September 1991 • Faculty, ABA Antitrust Section, The Cutting Edge of Antitrust: Market Power, October 1991 • Referee, *Quarterly Rev. of Econ. & Bus.*, 1992 • Referee, *Journal of Industrial Econ.*, 1992 • Leader, International Advisory Team on Competition Policy and Consumer Protection, Government of Argentina, 1992 • Referee, *Journal of Policy Analysis and Management*, 1992 • Organizer, World Bank Seminar on Competition Policy in Latin America, 1993 • Advisor, World Bank Philippines Private Sector Assessment, 1993 • Referee, National Research Council, 1993 • Speaker, World Bank/INDECOPI Conference on Competition Policy, Lima, Peru, 1994 • Speaker, International Law Institute Program for Russian Antitrust Officials, Washington, 1994 • Consultant on telecommunication to the Antitrust Division, U.S. Department of Justice, 1994 • Consultant on telecommunication to La Comisión Federal de Competencia, Mexico, 1994 • Referee, The Brookings Institution, 1994 • Editorial Board, HYPERTEXT MERGER POLICY PROJECT, 1994.

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